IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:22.03.2006

CORAM:

THE HON'BLE MR. JUSTICE P. SATHASIVAM
AND
THE HON'BLE MR. JUSTICE J.A.K. SAMPATHKUMAR

WRIT APPEAL NO.2702 of 1999

N. Balakrishnan .. Appellant/2nd Respondent

vs.

1. The Management
   Pandiyan Roadways
   Corporation Ltd.,
   Bye-pass Road
   Madurai 16. ..1st Respondent/Petitioner

2. The Presiding Officer
   Industrial Tribunal
   City Civil Court Building
   Chennai 600 104. ..2nd Respondents/1st Respondent

Writ Appeal filed under Clause 15 of the Letters Patent against the order of the learned single Judge dated 08.10.1999 made in Writ Petition No.1485 of 1990 Writ Petition filed under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue writ of certiorari calling for the records on the file of the 1st Respondent in Petition No.68 of 1986 in I.D.No.62 of 1982 and quash the order passed therein dated 19.4.1989.

For appellant : Mr. K.M. Ramesh
For respondents: Mr. L.G. Sahadevan for R.1

..

JUDGMENT

(Judgment of the Court was delivered by P. SATHASIVAM,J.)

Aggrieved by the order of the learned single Judge dated 08.10.1999 made in Writ Petition No.1485 of 1990, N. Balakrishnan, second respondent therein has filed the above writ appeal.

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2. For convenience, we shall refer the parties as arrayed in the writ petition.

3. The appellant herein is the second respondent in the writ petition. He was employed as a Helper in the petitioner Management/Transport Corporation at Kumuli Depot. According to the Management, on 03.11.1985, he went to the depot at midnight and after receiving the bonus amount due to him from the cashier, he slept in the officer room. After the cashier left the room, he opened the room with the keys and then opened the iron safe and removed Rs.37,086.05 and left the premises. A criminal complaint was lodged against the second respondent. The criminal case was taken as Case No.75 of 1986. On the basis of the report, a charge memo was issued to the second respondent on 13.11.1985. He was charged for having removed Rs.37,086.05 and violated the Standing Order by entering the Kumuli depot during night time, removing the said sum and not subjecting himself to security check. He submitted an explanation denying the charges. The management, not being satisfied with the explanation submitted by the second respondent, ordered domestic enquiry, in which he took part. The Enquiry Officer, submitted his report finding that the second respondent is guilty of the charges. The Management concurred with the findings of the Enquiry Officer and considering the gravity of the misconduct committed by him, decided to terminate the second respondent from service.

4. In terms of the Standing Orders, a second show cause notice was issued on 08.05.1986, directing him to show cause as to why he should not be removed from service. The second respondent submitted his reply on 18.05.1986. Ultimately, the Management, by order dated 16.06.1986, dismissed him from service. Since the disputes relating to all workmen with the petitioner Transport Corporation are pending before the Industrial Tribunal in I.A.No.62 of 1982, the petitioner, in compliance with the provisions of Section 33(2)(b) of the Industrial Disputes Act, filed an application for approval of the order of dismissal, which was numbered as Petition No.68 of 1986 in I.D.No.62 of 1982 on the file of first respondent/Industrial Tribunal, Chennai. After hearing both sides, the first respondent/ Tribunal dismissed the petition filed by the Management refusing to grant approval on the sole ground that the Management had violated Section 17(5) of the Standing Orders of the Corporation, which requires the management to take into account the past record before passing the order of dismissal. Aggrieved by the aforesaid order, the Transport Corporation has filed Writ Petition No.1485 of 1990. By order dated 08.10.1999, the learned Judge accepted the stand taken by the Management and set aside the order of the Tribunal and allowed the writ petition. Questioning the same, the second respondent therein filed the present writ appeal.

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5. Heard Mr. K.M. Ramesh, learned counsel for the appellant and Mr. L.G. Sahadevan, learned counsel for the first respondent Management.

6.The only point for consideration in this appeal is, whether the petitioner Management is justified in passing the order of dismissal without taking into consideration the past record of service as required in Clause 17(5) of the Standing Orders?

7. Mr. K.M. Ramesh, learned counsel appearing for the second respondent/appellant, by drawing our attention to clause 17(5) of the Standing Orders of the Corporation, contended that before passing an order imposing punishment, the employer has to take into account the gravity of the misconduct, previous record of the workman and other extenuating or aggravating circumstances. He also contended that as per Section 33(2) of the Industrial Disputes Act, 1947 (in short "I.D. Act"), it is mandatory on the part of the Management to consider the Standing Orders before imposing any punishment on the employees. Though the workman/appellant herein questioned the enquiry as well as the findings of the Enquiry Officer, the fact remains that he participated in the enquiry and also cross-examined the witnesses adduced on the side of the Management. In such circumstances, it is unnecessary for us to go into the validity of the enquiry and the ultimate conclusion arrived at by the Enquiry Officer.

8. It is further seen that on receipt of the report of the Enquiry Officer, the Management issued a second show cause notice dated 08.05.1986 informing that a punishment of dismissal is to be imposed on him and required him to offer explanation, if any, within 24 hours and the workman submitted his explanation on 18.05.1986. Not satisfied with the explanation, the Management passed the order on 18.06.1986 dismissing him from service.

9. Now, let us consider the Standing Orders applicable to the case on hand. Clause 17(5) of the Standing Orders reads as follows:

> "In awarding the punishment under this Standing Order the employer shall take into account the gravity of the misconduct, the previous record of the workman and any other extenuation or aggravating circumstances that may exist. "

A reading of the above clause 17(5) of the Standing Orders makes it clear that it is incumbent on the part of the Management, while awarding punishment, to take into account (a) gravity of misconduct; (b) previous record of the workman; and (c) other

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extenuating or aggravating circumstances. It is not in dispute that at the relevant time, the disputes relating to all workmen with the petitioner Corporation were pending before the Industrial Tribunal in I.D.No.62 of 1982. Hence, in compliance with the provisions of Section 33(2)(b) of the I.D. Act, the petitioner Transport Corporation filed an application before the Industrial Tribunal for the approval of the order of dismissal. Inasmuch as a duty is cast on the employer to comply with the clause 17(5) of the Standing Orders, it is proper on the part of the employer to take into account the previous record of the workman. It is the definite case of the workman that he had clean records and had the Management considered the same while imposing punishment, there would not have been any capital punishment, such as dismissal from service, as ordered in this case.

10. In 1994 (2) LLN 607 (A.R.C. Engineering Works vs. Somarajan), a Division Bench of this Court has held that where there is a provision in the Standing Orders for consideration of the past record, it is incumbent on the part of the Management to adhere to the same. The following conclusion is relevant:

> "5. On the second point Sri M.R. Narayanaswamy, learned counsel for the appellant, submits that the management having looked into the past record of service, it cannot be held that rule 17(5) had not been complied with. Sri Fenn Walter, learned counsel for the workmen, submits that a bald recital in the order issued, that the past record of service had been looked into cannot be treated as a substantial compliance as held in Writ Petition No.383 of 1977, and that when more than one workmen are involved, each one of them should have been told as to what past record of service had been taken into account, so that when the Labour Court exercises its powers under S.11A it could test whether the punishment imposed, on each one of them, is justified or not. In respect of each one of the seventeen workmen, the same words have been used, dealing with consideration of past record of service. Nothing preclude the management to supply an annexure listing out as to what were the punishments, which have been taken into account. Unless the relevant particulars are incorporated as part of the order it would disentitle the Labour Court, to precisely determine under S.11A as to how far all of them could be treated alike. In Writ Petition

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> No.383 of 1977, factually it was found that the past record had been taken into account. In the instant matter, as to what are the particulars which have been taken into account not being known, a generalised statement, would not come within the ambit of the doctrine of "substantial compliance". Now that the Labour Court has to exercise its powers under S.11A and as pointed out by the Supreme Court in Laxmiratan Cotton Mills vs. Workmen (1975-II L.L.N. 32) at the stage of the second show-cause notice, the past record of workmen would be a relevant factor. Therefore, the management is obliged to place before the Labour Court as to what are the particulars of the past record which it had taken into account in respect of each one of the workmen. Hence rule 17(5) had not been complied with by the management in the manner in which it is expected to do, by furnishing full details of the record of service it had taken into account. ....."

11. In 1997(1) LLJ 698 (Management of Easun ltd., v. Addl. Labour Court & Another) this Court has held that while considering the past record of the workman for the purpose of imposing extreme penalty, the worker is entitled to notice and for non-compliance, this Court is fully justified in interfering with the same under Article 226 of the Constitution of India. The conclusion of their Lordships in para 7 is relevant:

> "7. Therefore, on the second question argued by Mr. Balasubramanian, we have no hesitation in holding that in this case, the past record of service having been taken into account only for the purpose of imposing the extreme penalty, the order of punishment is vitiated because no notice was given to the worker before taking into account the past record of service to the prejudice of the worker. This is a legal infirmity in the order of dismissal as well as in the award of the Labour Court. This legal infirmity is sufficient to interfere with the judgment of the Labour Court in proceedings under Article 226 of the Constitution of India. .... "

12. In 2002 (2) SCC 244 (Jasipur Zila Sahakari Bhoomi Vikas Bank Ltd., vs. Ram Gopal Sharma), the Constitution Bench of the

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Supreme Court has held that the compliance of Section 33 of I.D. Act is mandatory and the following conclusion is relevant:

> "13. The proviso to Section 33 (2)(b), as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b), it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000 or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33 (2)(b) is to be operative. ....."

13. The Industrial Tribunal, after finding that though second opportunity was given, but the past record was not considered before imposing punishment and the same is in violation of clause 17(5) of the Standing Orders which is mandatory in nature, arrived at a conclusion that the order of dismissal is not sustainable, refused to grant approval for the same. The conclusion of the Industrial Tribunal is in consonance with the statutory provisions, as interpreted in the above decisions.

14. Unfortunately, the learned Judge while accepting the case of Management, committed two errors. The first one is that he proceeded that the charge levelled against the workman relates to misappropriation. It is not in dispute that based on the complaint of the Management, prosecution was launched against the workmen for the offence of theft, which also ended in acquittal in C.C.No.75 of 1986 on the file of Judicial Magistrate, Uthamapalyam dated 14.10.1987. Secondly, the learned Judge committed an error in holding that when an employee is involved in the case of misappropriation of funds, no lesser punishment than the dismissal from service can be imposed. However, according to the learned Judge when a major punishment is to be imposed depending upon the nature or gravity of the offence, then the factors mentioned in clause 17(5) of the Standing Orders have some relevance.

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15. It is also brought to our notice that pursuant to the order of the Tribunal dated 19.12.1989, the workman was allowed to work in the petitioner Transport Corporation and he continued till June, 2004 with unblemished records. In view of the language used in Clause 17(5) of the Standing Orders and that of Section 33 (2) (b) of the I.D. Act, we are unable to accept the view expressed by the learned Judge. On the other hand, we hold that in view of the fact that at the relevant time, the dispute relating to workmen with the petitioner Corporation was pending before the Industrial Tribunal and in the light of the language used in Section 33(2)(b) of the I.D. Act, which is held to be mandatory, the management/employer is bound to take into account the previous record of the employee as per the Standing Orders.

Under these circumstances, the order of the learned Judge dated 18.10.1999 made in W.P.No.1485 of 1990, is set aside and the writ appeal is allowed. No costs.

kh 22.03.2006

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Presiding Officer,
Industrial Tribunal
City Civil Court Building,
Chennai-104.

2. The Record Keeper,
VR Section,
High Court, Madras-104.

3. The Section Officer
Writ Section,
High Court, Madras-104.

1 cc to Mr.K.M.Ramesh, Advocate, SR.14098/06
1 cc to Mr.L.G.Sahadevan, Advocate, SR.14398/06
tm (co)

dv/3.4.06 W.A.No.2702 of 1999

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